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~~No. 01-1209~~

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CENTRAL LABORERS' PENSION FUND,
Petitioner,

v.

THOMAS E. HEINZ and RICHARD J. SCHMITT, JR.,
Respondents.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR PETITIONER

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In their brief, Respondents argue that (i) there may be no conflict between the Fifth and Seventh Circuits; (ii) the importance of the instant case to pension plans across the country is overstated; and (iii) the decision below is plainly correct. These arguments are wholly unpersuasive. Further review by this Court is warranted to resolve an inter-circuit conflict of national significance.

1. *There Is An Undeniable Conflict Between the Circuits.*

Respondents' initial argument in opposition to the petition for writ of certiorari is that there may well be no conflict of the circuits. This contention ignores and is utterly at odds with the majority panel below which expressly rejected the Fifth Circuit's decision in *Spacek v. Maritime Ass'n., ILA Pension Plan*, 134 F.3d 283 (5th Cir. 1998). Since the opin-

ion was in direct conflict with the Fifth Circuit, it was circulated pursuant to Circuit Rule 40(e) to all members of the Seventh Circuit in regular service. (App. 4a). Judge Cudahy, in dissent, also recognized that the majority's holding was contrary to the Fifth Circuit's *Spacek* decision. (App. 24a).

Despite the Seventh Circuit's acknowledgment of the conflict that its decision created, Respondents aver that a conflict, in fact, may not exist at all. They base this contention on *Harms v. Cavenham Forest Indus., Inc.*, 984 F.2d 686 (5th Cir. 1993), a Fifth Circuit decision antedating the *Spacek* ruling which, Respondents contend, represents a conflict within the Fifth Circuit. Relying on other Fifth Circuit case law which provides that in instances of an intra-circuit conflict, the earlier decision controls, Respondents argue that *Harms*, not *Spacek*, is the law in the Fifth Circuit. Analysis of *Harms*, however, quickly reveals the flaw in Respondents' contention.

The issue the Fifth Circuit considered in *Spacek*, as in the instant case, was whether a suspension of benefits resulting from an amendment to a plan's disqualifying employment provision violated ERISA's anti-cutback rule. By contrast, the Fifth Circuit in *Harms* considered whether a certain early retirement benefit was an accrued benefit for purposes of ERISA § 204(g)(2). The court in *Harms* in no way considered whether a suspension of benefits was an "elimination" or "reduction" for purposes of Section 204(g)(2).

Respondents nonetheless aver that the court in *Spacek* ". . . seems to have based that decision on a fundamental misunderstanding of the status of early retirement benefits under the anti-cutback rule. In the process, the court failed to follow earlier Fifth Circuit precedent on the status of early retirement benefits." (Opp. 10). Additionally, Respondents state that the *Spacek* court refused to acknowledge that early

retirement benefits are accrued benefits for purposes of ERISA § 204(g). (Opp. 11).

Respondents, however, mischaracterize the action of the unanimous panel in *Spacek*. As the court explained, it was not called upon in the case to reach the issue of whether early retirement benefits are accrued benefits under ERISA's definition of that term. While acknowledging that the *Harms* court had apparently concluded that early retirement benefits or retirement-type subsidies are accrued benefits under ERISA, the *Spacek* court simply declined to address the question since the issue was not before it. *Spacek*, 134 F.3d 283, 291 n.9. In *Spacek*, the court found the issue of whether early retirement benefits were "accrued" for purposes of ERISA § 204(g)(2) to be irrelevant to the resolution of the matter before it. In finding that it need not reach this issue, the court reasoned that an amendment providing for the suspension of early retirement benefits, whether fully accrued or not, did not violate § 204(g)(2) because a "suspension" is neither an "elimination" or "reduction" of benefits. The *Spacek* court correctly did not consider its opinion to be in conflict with *Harms*, and Respondents have failed to demonstrate that a conflict exists.

The Fifth and Seventh Circuits, faced with cases of striking factual similarity, have considered whether a "suspension" of early retirement benefits is a "reduction" or "elimination" of benefits prohibited under ERISA's anti-cutback rule and rendered opinions which are diametrically opposed to each other. "Cases are properly regarded as conflicting if it can be said with confidence that another circuit would decide the case differently because of language in an opinion in a case having substantial factual similarity." R.Stern, et al., Supreme Court Practice 434 (8th Ed. 2001). In instances when a different legal standard requiring a different ruling is established in a "very similar case coming from another lower court, there is a clear conflict." W. Rehnquist, The Supreme

Court, 265 (1987). As recognized by the Seventh Circuit, its holding in the instant case and the *Spacek* decision present just such a conflict that only this Court can resolve.

2. *If the Circuit Conflict Is Not Resolved, the Adverse Impact on Multiemployer Pension Plans Will Be Substantial and Immediate.*

In its effort to discourage this Court from granting the petition for writ of certiorari, Respondents downplay Petitioner's forecast of significant, adverse consequences for multiemployer pension plans if the decision below is left to stand. As to Petitioner's contention that the amendment of a plan's "disqualifying employment" rules is necessary from time to time to protect its fiscal integrity, Respondents cite to the "substantial business hardship" exception to the anti-cutback rule. See ERISA § 302(c)(8). As to less extreme financial exigencies, Respondents argue, somewhat cavalierly, that unexpected financial downturns (or, as in the instant case, larger than anticipated numbers of early retirees) are simply a "necessary fact of life." (Opp. 14).

The *amicus curiae* briefs filed in support of the Petitioner, however, persuasively demonstrate that the negative effects of an unresolved circuit conflict on plans and participants alike are quite real and should not be underestimated. Central States, Southeast and Southwest Areas Pension Fund ("Central States") advises that it is the largest multiemployer defined pension plan in the United States with more than 187,000 active participants, over 75,000 vested inactive participants, and over 199,000 retirees. The National Coordinating Committee for Multiemployer Plans (the "NCCMP") is a non-profit, tax-exempt organization currently having 309 multiemployer pension plan affiliates throughout the country. Each *amicus curiae* confirms Petitioner's contentions and demonstrate the error of Respondents' assertions that the impact of the decision below is overstated.

According to Central States' brief, its plan has already been affected. On March 13, 2002, Central States amended its pension plan effective July 1, 2002, to expand its definition of disqualifying employment for participants retiring after the amendment's effective date, thereby increasing the likelihood of benefit suspension of retirees. The amendment was enacted in reliance, in part, on *Spacek*. After learning of the decision below, however, Central States was faced with a serious administrative dilemma since its participants are potentially subject to the two conflicting rules set forth by the Fifth and Seventh Circuits.[1] (Brief of Central States as *Amicus Curiae* 3). Recognizing the uncertainty of the current legal landscape, Central States subsequently rescinded its amendment to the prohibited re-employment rules which it believed to be in the best interest of the financial integrity of the plan and of its participants.

The NCCMP brings an even broader perspective to the importance of the issue presented in the instant case and the administrative problems created by an unresolved circuit conflict. According to the NCCMP, multiemployer plans previously have amended disqualifying employment provisions in reliance on statute, case law and IRS guidance without concern that they could be violating ERISA's anti-cutback provision. The Seventh Circuit's decision has imposed a new and unwarranted restraint on the ability of trustees to respond to changing economic circumstances. As a result, NCCMP expects that the trustees of plans which have amended their disqualifying employment rules must review and revise their current suspension rules. (Brief of NCCMP as *Amicus Curiae* 8).

Additionally, the NCCMP agrees with Central States' assessment of the administrative burden which will be placed

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[1] The practical administrative problems faced by Central States are well-described in its brief and need not be recounted here.

on pension plans which have participants working or residing in the states comprising the Seventh Circuit. (Brief of NCCMP as *Amicus Curiae* 12). The NCCMP correctly points out that the administrative burden on trustees outside the Fifth, Sixth or Seventh Circuits is even more difficult. (Brief of NCCMP as *Amicus Curiae* 13). And, perhaps most significantly, the NCCMP concludes that in removing the long-established ability of trustees to protect the actuarial soundness of plans through adjustment of disqualifying employment rules, the Seventh Circuit has placed the interests of employees who "retire" at early ages and continue to work such as Respondents[2] over the interests of active employees, unemployed participants and actual retirees. (Brief of NCCMP as *Amicus Curiae* 14-15).

Each *amicus curiae* brief completely discredits Respondents' assertions that the instant case lacks the importance attributed to it by Petitioner. Each brief also persuasively refutes Respondents' suggestion that the issue presented is one that should be resolved over time by other lower courts. The administrative and economic burdens faced by multi-employer plan trustees and administrators in the wake of the Seventh Circuit's decision are daunting and will have significant and immediate adverse impact. The case presents an excellent vehicle for a prompt resolution of an important ERISA issue by this Court.

3. *The Need for a Definitive Adjudication Is Manifest in That Both the Fifth Circuit and the Seventh Circuit Claim That Their Respective Decision Is "Plainly Correct."*

Respondents argue that the decision of the Seventh Circuit is "plainly correct" and constitutes the "only plausibly

[2] Both Messrs. Heinz and Schmitt were 39 years old when they began receiving pension benefits.

defensible interpretation of the anti-cutback rule." (Opp. 15). In fact, both the Fifth Circuit in *Spacek* and the Seventh Circuit in this case below declare that their respective (and contrary) interpretations of the same statutory provision involving the same legal issue is "plainly correct."[3] Clearly, both Courts cannot appropriately embrace the notion of "plain language" and come down on opposite sides of the issue. The need for a definitive construction of the anti-cutback rule is manifest, not only because the decisions create a conflict between the circuits, but because the decisions are so fundamentally opposed that they create legitimate questions as to the integrity of "plain meaning" analysis.[4]

Respondents next argue that the suspension in this case constitutes a "reduction" for purposes of the anti-cutback rule

[3] The Fifth Circuit states that "[w]hile Spacek's interpretation of Section 1054(g) has some logical appeal, it fails to comport with the plain language of § 1054 (g). . ." and "under the plain language of the statute, a suspension of benefit payments [for disqualifying employment] is not a reduction of early retirement benefits within the plain meaning of Section 1054(g)(2)," *Spacek*, at 289. The Seventh Circuit majority states "that 29 U.S.C. § 1054(g) unambiguously applies to the amendment in this case . . ." (App. 23a) and "this was a reduction of early retirement benefits within the plain meaning of § 1054(g)(2)." (App.10a).

[4] Indeed, Judge Cudahy is just as adamant in his dissent in the case below as the others on the respective panels of each circuit. He refers to the "sometimes tortured contentions of the majority" (App. 24a). that "do violence to the clear intent of the drafters [of the anti-cutback rule]." (App. 31a). Judge Cudahy also surmised that the court in the Sixth Circuit case of *Whisman v. Robbins*, 55 F.3d 1140 (6th Cir. 1995), which concluded that a "suspension" was not an "elimination" or "reduction," thought that the conclusion was obvious from the plain meaning of § 1054(g)(2). The fact that the language of the statute creates such extreme discord among the highly respected and considered judges of two reviewing courts only hints at the degree of confusion and uncertainty that the decisions leave in their wake for those pension participants, administrators, trustees, consultants and counselors who must deal with the practical application of such decisions.

akin to amendments made by other plans which were found to violate ERISA § 204(g). *See Michael v. Riverside Cement Co. Pension Plan,* 266 F.3d 1023 (9th Cir. 2001) and *Hickey v. Chicago Truck Drivers, Helpers & Warehouse Workers Union*, 980 F.2d 465 (7th Cir. 1992). But perusal of each of these case shows that they are clearly inapposite. In *Michael*, the plan originally provided that a participant who retired, returned to employment, and retired a second time would not have his benefit actuarially reduced to account for the prior benefits he received. The Ninth Circuit found that an amendment to that plan which required an actuarial *reduction* of the participant's monthly pension benefit violated ERISA's anti-cutback rule. Similarly, in *Hickey*, the Seventh Circuit found that a plan amendment reducing benefits by eliminating the cost-of-living-adjustment component of such benefits also violated the anti-cutback rule. The distinction between *Michael* and *Hickey* and the instant case is obvious: the former two cases involved a "reduction" in the calculation of participants' monthly benefits, not a "suspension" of those benefits.

Similarly, Respondents' attempt to demonstrate the fallacy of the *Spacek* holding through a "simple hypothetical" is equally inapposite. Respondents suggest that under Petitioner's (and, thus *Spacek's*) approach, a pension plan could simply adopt an amendment ending all early retirement benefits for 18 months as long as it called it a "suspension." The cessation of benefit payments in Respondents' hypothetical example is unrelated to any return to disqualifying employment by the early retirees which is, of course, the issue at bar.

Respondents' reference to *Michael* and *Hickey* and their use of the hypothetical example miss the point. *Spacek*, as set forth in the Petition, is in accord with statutory language, legislative history, applicable regulations and the position of the Internal Revenue Service in concluding that a

"suspension" of early retirement benefits based on disqualifying employment rules is not an "elimination" or "reduction" of benefits which would violate the anti-cutback rule. The Seventh Circuit in the case below completely rejected the *Spacek* analysis, holding that a "suspension" was a "reduction" or "elimination" for purposes of the anti-cutback rule by expanding the concept of "pension benefits" to include the qualitative conditions of post-retirement employment opportunities.

The stark conflict between the circuits and the immediate adverse impact on multiemployer pension plans throughout the United States, as amply illustrated by the *amicus curiae* briefs filed herein, demonstrate the importance of this Court's review to resolve this significant ERISA issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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